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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

WILLIAM H. SHERWOOD, Administrator with Will Annexed of the Estate of Floyd T. Brown, Deceased ..... Petitioner

vs.

PEARL RIVER VALLEY WATER SUPPLY DISTRICT, A Body Corporate and Public Organized Under and Existing by Virtue of the Laws of Mississippi, 1958 ..... Respondent

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

STATEMENT OF THE CASE

The petitioner's land was condemned by the Pearl River Valley Water Supply District and taken through eminent domain proceedings in 1962. There is no question about the constitutional validity of these proceedings. *Pearl River Valley Water Supply District v. Brown*, 248 Miss. 4, 156 So.2d 572 (1963), 248 Miss.

23, 158 So.2d 694 (1963) (costs), cert. den., 376 U.S. 970, 12 L.Ed. 2d 84 (1964). The petitioner now contends that new facts have arisen since 1962 which have prejudiced his rights. The District Court, *Sherwood v. Pearl River Valley Water Supply District*, 301 F. Supp. 61 (S.D. Miss. 1969) and the Circuit Court of Appeals, *Sherwood v. Pearl River Valley Water Supply District*, No. 27820 (5th Cir. June 19, 1970) (Pet. App. pp. 11-16) have both denied his claim on the ground that it fails to state a claim for which relief can be granted.

JURISDICTION

1. Petitioner totally fails to meet the jurisdictional requirements for a Writ of Certiorari.

The petitioner asks for review by Writ of Certiorari under 28 U.S.C. § 1254(1). In the annotations to this statute, 28 U.S.C.A. § 1254 pp. 66-67, a multitude of cases[1] are given in support of the following proposition: "Jurisdiction to review by certiorari should be sparingly exercised, and only in cases of peculiar gravity and general importance, or in cases affecting relations with foreign governments or to secure uniformity of decision."

In a decision rendered in 1892, *In re John Woods and Stephen B. Lovejoy*, 143 U.S. 202, 136 L.Ed. 125 (1892), the Court dismissed a petition for Writ of Certiorari asking for review of a Circuit Court of Appeals' final judgment in a personal injury suit, stating that the Circuit Courts of Appeal were created for the purpose of relieving the Supreme Court of the

[1] Among these are: In the Matter of John Woods and Stephen B. Lovejoy, 143 U.S. 202, 36 L.Ed. 125 (1892) (personal injury); Thomas M. Fields v. United States, 205 U.S. 292, 51 L.Ed. 807 (1907) (criminal); Houston Oil Company of Texas v. Cornelia G. Goodrich, 245 U.S. 440, 62 L.Ed. 385 (1918) (title dispute).

"oppressive burden of general litigation." The necessity that the Supreme Court be relieved of burdensome general litigation by the Circuit Courts of Appeal is even greater in 1970. The Court, therefore, should strictly construe United States Supreme Court Rule 19. 1. which now embodies the long established principle that "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor."

The petitioner's claim falls into the category of general litigation. The allegations of the petitioner clearly show that the claim for relief is not one of peculiar gravity and general importance, but is simply general litigation. In fact this litigation grows out of a routine eminent domain suit under state law, Miss. Code Ann. (1956) § 5956-60. While the petitioner attempts to make his claim worthy of review by giving the impression that the Court has failed to review eminent domain cases during the last decade, the contrary seems to be true. During the 1960s the Court entertained many eminent domain cases concerning a great variety of issues. *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 4 L.Ed. 2d 584 (1960) (taking Indian Reservation land for a storage reservoir of a hydroelectric power project); *Cecil W. Armstrong v. United States*, 364 U.S. 40, 4 L.Ed. 2d 1554 (1960) (right of materialmen to resort to the specific property for the satisfaction of their claims); *United States v. Virginia Electric and Power Co.*, 365 U.S. 624, 5 L.Ed. 2d 838 (1961) (value of a flowage easement); *Thomas N. Griggs v. County of Allegheny*, 369 U.S. 84, 7 L.Ed. 2d 585 (1962) (taking of an air easement); *Madeline C. Shroeder v. City of New York*, 371 U.S. 208, 9 L.Ed.

2d 255 (1962) (adequacy of notice); *Raymond R. Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 9 L.Ed. 2d 350 (1963) (effect of pending administrative proceedings while condemnation suit was being litigated); *H. P. Dugan v. Everett G. Rank*, 372 U.S. 609, 10 L.Ed. 2d 15 (1963) (diversion of water); *City of Fresno v. State of California*, 372 U.S. 627, 10 L.Ed. 2d 28 (1963) (rights to underground water); *United States v. Louis T. Mortz*, 376 U.S. 192, 11 L.Ed. 2d 629 (1964) (assessment of damages); *United States v. R. B. Rands*, 389 U.S. 121, 19 L.Ed. 2d 329 (1967) (compensation for lands' value as a port site); *The National Board of Young Men's Christian Associations v. United States*, 395 U.S. 85, 23 L.Ed. 2d 117 (1969) (damage to buildings by rioters).

ARGUMENT

Issue: Whether the Petitioner has been denied his constitutional right to due process of law.

The petitioner bases his request for appeal to the Supreme Court on the allegation that new facts have arisen since 1962[2] which entitle him to another trial on the right to take. He relies primarily on Judge Godbold's dissent in the Fifth Circuit Court of Appeals Decision, supra, stating that the petitioner has a right to a new trial on the charges made because the previous cases are not res judicata on this issue. In his dissent (Pet.App. pp.14-15) Judge Godbold cites *Guam Investment Co. v. Central Building, Inc.*, 288 F.2d 19 (9th Cir. 1961), and *Florsguth Laboratories v. Goldberg*, 191 F.2d 877 (7th Cir. 1951) as authority that the res

[2] The 1962 eminent domain proceedings were held to be for a legitimate public purpose rather than a private purpose as alleged by petitioner. Pearl River Valley Water Supply District v. Brown, 248 Miss. 4, 156 So.2d 572 (1963), 248 Miss. 23, 158 So.2d 694 (1963) (costs), cert. den., 376 U.S. 970, 12 L.Ed. 2d 84 (1964).

judicata approach taken by the District Court, supra, and affirmed by the Fifth Circuit, supra, was erroneous because the action to dismiss failed to offer extrinsic documents in support of the res judicata defense. The fine procedural point relied upon by the Petitioner is insufficient to warrant further prolongation of this litigation. The majority of the Fifth Circuit, after studying the long history of this litigation dating back to 1959, agreed with the District Court opinion, supra, that the case should be dismissed. Judge Nixon, the District Court judge, on pages 62-63 of his opinion, gave the following history of the litigation:

> The Water Supply District condemned 630.2 acres of property belonging to Floyd T. Brown and his family, all of which Floyd T. Brown himself originally owned and all of which has been operated as a single farming unit. The Browns have contested the taking for over eight years in both the state and federal courts. The judgment which Floyd T. Brown's administrator attacks here is that of the Madison County Circuit Court denying a writ of prohibition, rejecting the Browns' argument that the taking here was for a private, rather than a public, purpose and thus violative of section 17 of the Mississippi Constitution which prohibits taking of private property for non-public use. The Mississippi Supreme Court affirmed the Madison County Circuit Court in Brown v. Pearl River Valley Water Supply District, 249 Miss. 697, 163 So. 2d 732 (1964).
>
> The writ of prohibition trial consisted of a consolidation of three cases involving members of the Brown family, including Floyd T. Brown's suit. Through stipulation, the testimony and evidence in yet a fourth case involving members of the Brown

family, J. Leland and Mrs. Amis [sic] Brown, and this same 630.2 acre tract were incorporated in the record of the consolidated writ of prohibition suits. In the companion case, involving J. Leland and Mrs. Amis [sic] Brown, the Mississippi Supreme Court had found the taking to be for a public purpose. Pearl River Valley Water Supply District v. Brown, 248 Miss. 4, 156 So.2d 572, 158 So.2d 694 (1963), cert. den., Brown v. Pearl River Valley Water Supply District, 376 U.S. 970, 84 S.Ct. 1136, 12 L.Ed. 2d 84 (1964).

After giving this history the trial court made the following comment at page 63:

> Having been rebuffed by a federal district court, the Fifth Circuit, the Madison County Circuit Court twice, the Mississippi Supreme Court twice, and the United States Supreme Court—always on essentially the same question as to the public vs. private purpose of the taking—the Brown attorneys are back in Court. . . .

We submit that Judge Nixon's opinion clearly reflects that, whether or not the previous cases were res judicata as to the present issue, they establish such a strong precedent that it would be useless to have yet another trial between these litigants on this particular subject matter.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Of Counsel for Respondent

CERTIFICATE

I, L. Arnold Pyle, the Attorney for the Respondent herein, and a Member of the Bar of the Supreme Court of the United States, do hereby certify that on the 21 day of August, 1970, I served five printed copies of the foregoing Response to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit on the Honorable A. W. Storms, Attorney At Law, 417 East Avenue, Holdrege, Nebraska, Attorney for William H. Sherwood, Administrator with Will Annexed of the Estate of Floyd T. Brown, Deceased, Petitioner, by United States Airmail, in a duly addressed envelope, postage prepaid.

L. Arnold Pyle

L. ARNOLD PYLE
Attorney for Pearl River Valley Water Supply District, Respondent